United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

10 sh

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

APRIL TERM, 1910.

No. 2126. 714

PERCY METZGER, APPELLANT,

vs.

MILLARD METZGER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED FEBRUARY 21, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1910.

No. 2126.

PERCY METZGER, APPELLANT,

vs.

MILLARD METZGER, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 7, 1910

In the Court of Appeals of the District of Columbia.

No. 2126.

PERCY METZGER, Appellant,
vs.
MILLARD METZGER.

---

a Supreme Court of the District of Columbia.

No. 46460. At Law.

MILLARD METZGER, Plaintiff,
vs.
PERCY METZGER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Declaration.*

Filed Sep. 25, 1903. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, the 24th Day of September, 1903.

No. 46460. At Law.

MILLARD METZGER, Plaintiff,
vs.
PERCY METZGER, Defendant.

First. The plaintiff sues the defendant for money payable by the defendant to the plaintiff for that, on the 27th day of September, A. D., 1897 the defendant Percy Metzger, made his certain promissory note, now overdue, and thereby promised to pay to the order of Virginia Fauble on or before three years after date, Twelve Hundred and Fifty Dollars, ($1250.00) with interest thereon at the rate of six per centum per annum, until paid, and payable at the Central

National Bank, and the said Virginia Fauble, before its maturity for value, endorsed said note to the plaintiff, and at its maturity, the said note was duly presented for payment, and was dishonored and the said note has not been paid.

Second. The plaintiff also sues the defendant for money payable by the defendant to the plaintiff for that, on the 27th day of September, A. D., 1897, the defendant, Percy Metzger, made his certain promissory note, now overdue, and thereby promised to pay to the order of John P. Fauble, on or before three years after date,
2 Twelve Hundred and Fifty Dollars, ($1,250.00) with interest thereon at the rate of six per cent per annum, until paid, and payable at the Central National Bank, and the said John P. Fauble, before its maturity for value, endorsed said note to the plaintiff and at its maturity the said note was duly presented for payment and was dishonored, and the said note has not been paid.

Third. And for money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant; and for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims Two Thousand and Five Hundred Dollars ($2,500.00) with interest at the rate of six per centum per annum from the 27th day of September, 1897, until paid, according to the particulars of demand hereto annexed, besides costs of this suit.

HOSEA B. MOULTON,
Attorney for Plaintiff.

3 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

H. B. MOULTON,
Attorney for Plaintiff.

DISTRICT OF COLUMBIA,
City of Washington, To wit:

Millard Metzger swears that he is the plaintiff named in the declaration to which this affidavit is attached, and which is referred to and made a part of this affidavit; that the plaintiff's cause of action therein is based upon the following facts, to wit: The defendant being indebted to the plaintiff in the sum of Two Thousand and Five Hundred Dollars ($2,500.00) made, executed and delivered to the plaintiff in settlement of said indebtedness the two promissory notes sued upon, payable as set forth in the declaration and secured thereby a second deed of Trust on lots 68 and 69, Square 723, and assured the plaintiff that said *notice* would be paid by him when due, but he failed to pay them or any part of them when due, and the said real estate was sold under the first Trust and did not sell for enough to

pay the first Trust and costs, and not one cent has ever been paid on said notes or either of them and the plaintiff was obliged to and did take up the said notes and the payees therein endorsed said notes to the plaintiff before maturity, and for a valid consideration,
4 and the whole of said notes with interest at six per cent from September 27, 1897, as claimed in the declaration, is justly due and owing to the plaintiff by the defendant by reason of the premises, exclusive of all set-offs and just grounds of defense.

MILLARD METZGER.

Subscribed and sworn to before me this 25th day of September, A. D., 1903.

[SEAL.]

EMORY H. BOGLEY,
Notary Public.

Defendant's Pleas.

Filed Oct. 24, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 46460.

MILLARD METZGER
v.
PERCY METZGER.

1. The defendant says for plea to the first count of the plaintiff's declaration, that he did not promise as therein alleged.

2. And for a further plea to the first count of the plaintiff's declaration, the defendant says that he is not indebted as therein alleged.

3. And for a further plea to the first count of the plaintiff's declaration, the defendant says that the supposed cause of action therein set out did not accrue to the plaintiff at any time within three years before the commencement of this suit.

5 4. The defendant says for plea to the second count of the plaintiff's declaration, that he did not promise as therein alleged.

5. And for a further plea to the second count of the plaintiff's declaration, the defendant says that he is not indebted as therein alleged.

6. And for a further plea to the second count of the plaintiff's declaration, the defendant says that the supposed cause of action therein set out did not accrue to the plaintiff at any time within three years before the commencement of this suit.

7. The defendant says for plea to the third count of the plaintiff's declaration, that he did not promise as therein alleged.

8. And for a further plea to the third count of the plaintiff's declaration, the defendant says that he is not indebted as therein alleged.

9. And for a further plea to the third count of the plaintiff's dec-

laration, the defendant says that the supposed cause of action therein set out did not accrue to the plaintiff at any time within three years before the commencement of this suit.

VICTOR H. WALLACE,
Att'y for Defendant.

6 *Affidavit of Defense.*

Filed Oct. 24, 1903.

Percy Metzger, the defendant herein, for affidavit of defense, on his oath says, that he is not indebted to the plaintiff herein, Millard Metzger, in the sum claimed in his declaration and affidavit of claim, or in any sum whatever.

Affiant says that he did make the notes sued on in this action but under the following circumstances and conditions. That about twelve years prior to the commencement of this action, affiant and plaintiff, who are brothers, had been in business together. Before affiant became a member of the firm, plaintiff had borrowed $5000. from the mother of John P. and Virginia Fauble, who was the sister of affiant and plaintiff. Plaintiff never repaid this sum, and, after the death of his sister, he was sued by her executor in the Supreme Court of the District of Columbia, and judgment obtained against him for $5,000. and some interest.—See Ross Ex'r v. Metzger. At Law No. 35,516.—Affiant had no legal connection with transaction, the money having been borrowed by the plaintiff and the judgment having been obtained against him personally. Affiant however felt a moral obligation to see this judgment paid—to this end he agreed with his brother the said plaintiff, to give his two promissory notes for $1,250, each, to the order of his nephew and niece, John P. and Virginia Fauble, respectively, these notes being for one half of the money borrowed from his deceased sister, their mother,
7 by the plaintiff, provided, and upon the express consideration, that the plaintiff would pay the remaining one half of this amount, which the said plaintiff then and there agreed to do. At this time the affiant was not indebted to either John P. or Virginia Fauble in any sum whatever. And he expressly denies that he was then indebted to the plaintiff in the sum of $2,500, as alleged in his affidavit of claim, or in any other sum whatever. These notes when drawn by affiant were given to the plaintiff for delivery to the said John P. and Virginia Fauble, with the understanding that they represented one half of the plaintiff's indebtedness to the said John P. and Virginia Fauble, as heirs at law and next of kin of their deceased mother. That the plaintiff utterly failed to carry out his part of the agreement, but thereafter secretly and without affiant's knowledge and consent, compromised this $5,000. judgment for the sum of $2,500, and never delivered the promissory notes made by affiant to either the said John P. or Virginia Fauble, but while still retaining these notes in his own possession, obtained their endorsement to said notes without their knowledge as to the nature of the papers that they endorsed.

Affiant avers that in view of the premises all consideration for the said notes utterly failed, and that the said notes became and were utterly void for want of consideration, and that plaintiff is not a bona fide holder for value.

Affiant further states by way of defense that the notes sued
8 for in the declaration, and the consideration sued for in the common counts, and the amounts claimed in the affidavit of claim were all barred by the statute of limitations at the time of the commencement of this action.

PERCY METZGER.

Subscribed and sworn to before me this 24" day of October 1903.

J. R. YOUNG, *Clerk,*
By ALF G. BUHRMAN, *Ass't Clerk.*

Joinder in Issue.

Filed Oct. 30, 1903.

In the Supreme Court of the District of Columbia.

At Law. #46460.

MILLARD METZGER
vs.
PERCY METZGER.

The plaintiff joins issue upon the defendant's first, second, third, fourth, fifth, sixth, seventh, eighth and ninth pleas, filed in the above entitled cause.

H. B. MOULTON,
Attorney for Plaintiff.

9 Supreme Court of the District of Columbia.

THURSDAY, *November* 4, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

At Law. No. 46460.

MILLARD METZGER, Pl't'f,
vs.
PERCY METZGER, Def't.

Now come here as well the plaintiff by his Attorneys Messrs. H. B. Moulton and W. W. Millan as the defendant by his Attorneys Messrs. C. A. Douglas and Victor H. Wallace and a jury of good and lawful men of this District, to wit:

Winter B. Miffleton,
Clarence W. Chamberlain,
Benjamin Sebastian,
James A. Keliher,
William S. Herndon,
Edward C. Crain,
William E. Thomas,
William M. Bornheim,
Douglas Brewer,
Bernardin F. Rover,
Samuel Fisher,
Elmer E. Fisher,

who being duly sworn to try the issue herein joined, after a partial hearing of the evidence, are respited until the meeting of the Court on Monday next.

MONDAY, *November* 8, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

10 At Law. No. 46460.

MILLARD METZGER, Pl't'f,
vs.
PERCY METZGER, Def't.

Come again the parties aforesaid, in manner aforesaid, and the same jury that was respited on Thursday last, who, after the case is given them in charge, upon their oath say they find the issue aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is Twenty-five hundred dollars ($2500) and costs.

Motion to Direct Clerk to Enter Judgment on Verdict, &c.

Filed Dec. 3, 1909.

In the Supreme Court of the District of Columbia.

At Law. 46460.

MILLARD METZGER, Plaintiff,
vs.
PERCY METZGER, Defendant.

Now comes the plaintiff by his Attorneys and moves the Court to instruct the Clerk to enter the judgment in this case in favor of the plaintiff for the sum of Twenty-five Hundred Dollars in accordance with the verdict as recorded, with interest at the rate of six per centum per annum the rate named in the notes involved, as provided in section 1184 of the Code.

H. B. MOULTON,
W. W. MILLAN,
Attorneys for Plaintiff.

11 Take notice that this motion has been calendared for Friday December 10th, 1909.

H. B. MOULTON,
W. W. MILLAN,
Attorneys for Plaintiff.

To Messrs. Victor Wallace and C. A. Douglas, Attorneys for Defendant.

(Endorsed.)

No question having been made by either the pleadings or evidence, about part payment of principal or interest, it seems to me Sec. 1184 requires the granting of this motion. So ordered.

W.

Supreme Court of the District of Columbia.

FRIDAY, *December* 17, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 46460.

MILLARD METZGER, Pl't'f,
vs.
PERCY METZGER, Def't.

Upon consideration of the motion of plaintiff filed herein, for judgment on the verdict rendered in this cause, as provided by Section 1184 of the Code, it is ordered that said motion be and it is hereby granted.

12 Therefore it is considered that the plaintiff recover against the defendant the sum of Twenty-five Hundred Dollars ($2500) with interest at the rate of six per cent per annum, from the 27th day of September, 1897, being the money payable by said defendant to the plaintiff by reason of the premises, together with the costs of suit to be taxed by the clerk and have execution thereof.

Memoranda.

1909, December 21.—Appeal noted in open Court, attorney for appellee being present, and penalty of bond fixed at $100.00.
1910, January 7.—Appeal bond approved and filed.

Order for Transcript.

Filed Feb. 1, 1910.

In the Supreme Court of the District of Columbia, the First Day of February, 1910.

At Law. No. 46460.

MILLARD METZGER
vs.
PERCY METZGER.

The Clerk of said Court will make a transcript of this case for the Court of Appeals as follows: Declaration; Pleas; Affidavit of De-

fense; Joinder in issue; Nov'b'r 4/1909 Jury sworn and respited; Verdict for plaintiff; Dec. 3/1909 Motion for interest on verdict; Dec. 18/1909 Motion for interest on verdict granted. Dec.
13 18/1909 Judgment. Notation of appeal; Mem. of appeal bond; this designation.

VICTOR H. WALLACE,
Attorney for Defendant.

14 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 13, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 46460 at Law, wherein Millard Metzger is Plaintiff and Percy Metzger is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District this 18th day of February, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2126. Percy Metzger, appellant, vs. Millard Metzger. Court of Appeals, District of Columbia. Filed Feb. 21, 1910. Henry W. Hodges, clerk.

IN THE

Court of Appeals of the District of Columbia

APRIL TERM, 1910.

PERCY METZGER, *Appellant*,

vs.

MILLARD METZGER, *Appellee*.

No. 2126.

PERCY METZGER,
VICTOR H. WALLACE.

SUDWARTH PRINT, WASHINGTON, D. C.

IN THE

Court of Appeals of the District of Columbia

APRIL TERM, 1910.

PERCY METZGER, *Appellant*,
vs.
MILLARD METZGER, *Appellee*. } No. 2126.

This is an appeal from a judgment of the Supreme Court of the District of Columbia, holding a circuit court, which included interest in addition to the amount found by the verdict of the jury.

STATEMENT OF THE CASE.

On September 25, 1903, Millard Metzger, the plaintiff below, brought an action at law in the Supreme Court of the District of Columbia against Percy Metzger, the appellant in this Court, to recover the sum of $2,500, and interest, alleged to be due to him as the indorsee and holder for value of two certain promissory notes for $1,250 each, dated September 27, 1897, and bearing interest at the rate of 6% per annum, payable three years after date, and of which it was alleged the said Percy Metzger was the maker. (Record, pp. 1, 2.)

To this declaration the defendant filed several pleas, which embodied the general issue and the statute of limitations. He

also accompanied them with an affidavit of defense which will fully explain to this Court the grounds of his defense to the action. (Record, pp. 3, 4.)

Prior to the proceedings hereinafter set forth this cause was twice tried before two different juries. The first trial resulted in a disagreement of the jury. The second trial resulted in a verdict for the plaintiff, which was set aside and a new trial granted. These former trials are not relevant to the issues involved in this appeal, and no reference is made to them in the Record. They are merely mentioned to put the Court in possession of the history of the case.

Finally, upon November 4, 1909, this case came to trial before a third jury, and on the 8th day of that month the following verdict was returned.

> "Come again the parties aforesaid, in manner aforesaid, and the same jury that was respited on Thursday last, who, after the case is given them in charge, upon their oath say they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is Twenty-five Hundred ($2,500) Dollars and costs." (Record, p. 6.)

It will be observed that this verdict does not include any interest whatever. Thereafter, on December 3, 1909, before the entry of judgment, the plaintiff filed a motion requesting the Court to enter judgment in his favor for the sum of $2,500, with interest at the rate of 6% per annum. This motion was founded upon the alleged authority of Sec. 1184 of the Code of this District. (Record, p. 6.)

On the 17th of December, 1909, the court granted this motion and directed that judgment be entered for the plaintiff for $2,500, with interest from the 27th day of September, 1897. (Record, p. 7.)

From the entry of this judgment an appeal to this Court was noted. (Record, p. 7.)

ASSIGNMENTS OF ERROR.

The court erred:

1. In rendering judgment for interest when the verdict did not include interest, because a judgment must always conform to the verdict and be in the same amount as the verdict upon which it is founded.

2. In rendering judgment for interest when the verdict did not include interest, because by so doing the court usurped the functions of the jury in the determination of the defendant's plea of the statute of limitations.

3. In rendering judgment for interest when the verdict did not include interest, in alleged conformity with Sec. 1184 of the Code, because Sec. 1184 of the Code has no application to cases tried by jury, but applies only to judgments by default, or cases tried by the court without a jury.

4. In rendering judgment for interest when the verdict did not include interest, because so to do was to re-examine a fact tried by a jury, in violation of the provisions of the VII Amendment of the Constitution of the United States.

ARGUMENT.

I.

The action of the court in adding interest to a verdict which did not include interest, was contrary to the elementary principles of general law. It is a fundamental rule that a judgment must conform to and be limited by the verdict upon which it is founded. If a verdict is for a less sum than is shown to be due, or does not include interest where interest should have been allowed, the proper course is to grant a new trial; but the court can not itself remedy the defect by including interest in the judgment where none is given by the verdict.

Black on Judgments, Vol. 1, paragraphs 142, 147 and 186.

"C. Y. C.", Volume 23, title "Judgments," page 799, states the rule to be:

> "If plaintiff is entitled to interest on his claim or demand it should be found by the jury and included in their verdict * * *. But if the jury does not allow interest in its verdict, the court can not allow it and it is error to give judgment for interest in addition to the amount of the verdict."

And at page 801 of this same volume, it is said:

> "In respect to the amount of the recovery as in other particulars, the judgment must conform to the verdict, the successful party being entitled to a judgment for just what the jury have allowed him * * *."

See—

Freiberg *vs.* Brunswick, Balke, Collender Co., 16 S. W. 784. (Court of Appeals of Texas.)
Chain *vs.* Kelso, 7 Martin N. S. (La.) 263.
Gillett *vs.* Clark, 6 Montana 190.

See also—

Shearer *vs.* Smith, 35 Texas 427.
Clark *vs.* Gallaher, 3 Texas Civ. Ap. 541.
Smith *vs.* Smith, 10 Texas Civ. Ap. 485.
Southern Kansas Ry. Co. *vs.* Showalter, 57 Kansas 681.
Carter *vs.* Christie, 1 Kansas Ap. 604.
Flannagan *vs.* McWilliams, 52 Iowa 148.
Diedrich *vs.* The Northwestern Union Ry. Co., 47 Wis. 662.
Mitchell *vs.* Geisendorff, 44 Indiana 358.
Martin *vs.* Commonwealth, 6 J. J. Marsh (Ky.) 549.
Dale *vs.* Downs, 7 Martin N. S. (La.) 224.
Wichxrecht *vs.* Fasnacht, 17 La. An. 166.
Reid *vs.* Dunklin, 5 Ala. 205.

II.

The error of the court's action in this particular case, is made especially apparent by a reference to the question of the statute of limitations involved in this action. The promissory notes offered in evidence at the trial, provided for the payment of interest semi annually. The record shows that these notes were dated September 27, 1897, and the Record also shows that this action was not begun until September 25, 1903, almost six years from the date of the notes. It follows, therefore, that if this interest was payable semi-annually, a large part of it must have been barred by the statute of limitations, and one of defendant's pleas was the plea of limitations. The court, however, in rendering judgment, does not take into consideration the statute of limitations at all, but allows interest from the date of the notes.

At the trial no exceptions were taken by the defendant, and consequently, while the notes were offered in evidence, they never became part of the Record. And as no copy of them was attached to the declaration by way of particulars of demand, their form does not appear in this Record.

After judgment, having no exceptions, we could only bring up the Record proper, but none of the evidence offered at the trial. Consequently, although it is an admitted matter of fact, we have no way to legally show to this Court that the interest upon the notes was payable semi-annually, and therefore, a large part of it barred by the statute of limitations.

This clearly illustrates how a trial court, by allowing interest in a judgment, where none is given in the verdict, may entirely deprive the defendant of the benefit of the statute of limitations as to the interest; not only in the court below, but in the appellate court as well.

III.

The court below, in including interest in the judgment, purported to act under authority of Sec. 1184 of the Code, which is as follows:

> "Judgment for Liquidated Debts. In an action in the Supreme Court of the District to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable at the rate fixed by the contract, if any, until paid."

We respectfully submit that this section of the Code has no application to cases tried by jury, as it would otherwise be in conflict with the Seventh Amendment of the Constitution of the United States. As we can not presume that Congress passed an unconstitutional law, and as some effect should be given to the statute, we submit that its operation is confined to cases of judgments by default, or to cases tried by the court without a jury.

Such a statute, however, even as a matter of general law, and aside from constitutional considerations, ought not to authorize the entry of a judgment for a greater amount than the verdict.

Buck *vs.* Little, 24 Miss. 463.

IV.

While appellant believes that his foregoing contentions are supported by universal authority, yet if the decisions of the State courts were contrary to his contention, it would still be the rule that in a court of the United States a judge can not add interest to a verdict of a jury which does not give interest. The prohibition of the Seventh Amendment to the Constitution is positive. This amendment read:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

It seems hardly necessary to argue that to add interest, amounting to $1,800, to a finding of a jury which in express terms is limited to $2,500, involves a re-examination of the facts relating to the amount actually due. The jury tries the fact of the amount due, and finds it to be $2,500, the court then re-examines this fact and finds that $1,800 more is due, representing over twelve years of accumulated interest.

The Supreme Court of the United States has said that the only methods known to the common law for the re-examination of a jury's findings were through a new trial, granted by the trial court, or by the award of a *venire facias de novo* by the appellate court.

Parsons *vs.* Bedford, 3 Peters 333-447.
The Justices *vs.* Murray, 9 Wallace 274.
Story on the Constitution., Vol. 2, par. 1768 *et seq.*

V.

In conclusion the appellant asks that in deciding this case this Court will order a new trial. Appellant believes that the jury who last tried this case made him the victim of a compromise verdict. In other words, that an average was struck between the contending elements of the jury, and that a verdict was reached by awarding the principal of the notes and disallowing the interest.

Appellant candidly admits that if any liability attaches to him at all, it attaches for such part of the interest as is not barred by limitations, as well as for the principal.

He earnestly believes that the ends of justice will be best served by the granting of a new trial to be had before another jury, who shall either find directly in his behalf, or else allow to the plaintiff the entire amount to which the evidence shows him to be entitled.

Respectfully submitted by,

PERCY METZGER,

VICTOR H. WALLACE.